90-732

(1)

Supreme Court, U.S.
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NO.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

In the Matter of Louis Kerlinsky
Petitioner

# Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

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A. Questions Presented for Review.

1. Has the Supreme Judicial Court of the Commonwealth of Massachusetts disregarded the rule of law by imposing, in effect, ex post facto punishment and disciplinary sanctions on an attorney?

2. Was there any "fair warning" that attorneys were subject to disciplinary sanctions for claiming entitlement to extra pay for extra work of an appeal, where there was case law in other jurisdictions in support of this position and no Massachusetts precedent to the contrary?

3. Where petitioner's contingent fee agreement was in a form promulgated by the Supreme Judicial Court which had never been judicially interpreted and he acted in good faith and relied upon a plausible, although ultimately incorrect, interpretation of this

contract in claiming an extra fee for an appeal, that it terminated following trial, was punishment of him for so doing in violation of his due process rights under the Fifth and Fourteenth Amendment?

4. Was there "a due process violation of the most basic sort" where an attorney was punished because he did what the law plainly allowed him to do, to rely on a plausible interpretation of a writing, especially when Bar Counsel and Board of Bar Overseers initially agreed that his interpretation of his contract did not involve any ethical violations?

5. Is the legal system undermined when a disregard of its fundamental principle, the rule of law, by the Supreme Judicial Court of a state is uncorrected?

B. All the parties to the proceeding in the court whose judgment is sought to be reviewed are the Board of Bar Overseers and Bar Counsel, 75 Federal Street, Boston, MA 02110.

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D. The official report of the opinion delivered in the case by the Supreme Judicial Court (SJC) is recorded in 406 Mass. 67, 546 N.E.2d 150, and is annexed hereto, marked "A".

E. i. The dates of the Orders sought to be reviewed are November 13, 1989 and

clarifications of August 16, 1990, and September 4, 1990. The Orders of August 16 and September 4, 1990 are annexed hereto, marked "B & C". ii. Petitioner's motion for rehearing was denied on September 19, 1990. iv. The Court has jurisdiction to review the judgment and decree in question by Writ of Certiorari under 28 U.S.C., section 1257(3).

F. The Constitutional provision involved in the case is the Fifth Amendment of the Constitution of the United States (and the Fourteenth Amendment). "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

G. Statement of the Case

The Supreme Judicial Court (SJC) of the Commonwealth of Massachusetts of 1404 Courthouse, Boston, MA 02108, on an information filed by the Board of Bar of Overseers (Board) by its Bar Counsel of 75 Federal Street, Boston, MA 02110, entered an order and opinion recorded in 406 Mass. 67, 546 N.E.2d 150 (1989) publicly censuring the petitioner and ordering payment to his former client's estate of certain monies as a sanction. Petitioner in effect was ordered on August 16, 1990 to pay $9,673.01 in

addition to the $19,187.56 he had already paid for a total of $28,860.57. He did so.

The underlying action was initially heard by a hearing committee of the Board of Bar Overseers and reviewed by a panel of the Board of Bar Overseers and by the Board. An information, including the record compiled before the Board, was filed by the Bar Counsel in the SJC on January 9, 1989. Without any other proceedings, after oral argument only, on January 24, 1989, a Single Justice entered an order thereon on February 21, 1989. His order was appealed to the full bench of the SJC.

The Supreme Judicial Court concluded that Mr. Kerlinsky acted improperly and that the discipline ordered by the single justice was appropriate. Bar Counsel filed a Motion for Clarification. A Memorandum and Order was

entered thereon by a single justice August 16, 1990. On September 4, 1990, the SJC entered the Order specified, thereby finalizing the opinion and order of November 13, 1989. Petitioner's motion for rehearing was denied on September 19, 1990.

H. Statements of Facts

Proceedings before the Board pertained to allegations that Mr. Kerlinsky violated several bar disciplinary rules in the disposition of settlements negotiated by him on behalf of Joseph E. Calvanese in a personal injury action against Faulkner Hardware Company and W.W. Babcock, Company, Inc.

Mr. Kerlinsky has practiced law in the Commonwealth since 1952. On September 16, 1965, Calvanese and Mr. Kerlinsky entered into a written contingent fee agreement using

the form set out in SJC General Rule 14, 348 Mass. 806 (1965). The agreement described "the claim controversy, and other matters with reference to which the services are to be performed" simply as the "accident of June 30, 1965". The agreement also called for "reasonable compensation....to be paid by the client to the attorney....not to exceed the following maximum percentages of the gross amount collected:....33 1/3% if Court action".

In 1967 Kerlinsky brought suit against Faulkner Hardware Company, a Massachusetts business which sold the ladder to Calvanese's employer, from which he fell, and referred the case against Babcock Company, the manufacturer, to a New York law firm. In June 1975, after discharging this law firm, Calvanese signed a document purporting to

hire Attorney Blumberg of New York to institute legal proceedings against Babcock. Calvanese agreed to pay Mr. Blumberg 50% of any settlement, verdict or recovery obtained in the Babcock action. Calvanese signed the agreement in which was written above his signature "one third of said fee is to be paid to Attorney Louis Kerlinsky". In April 1976, Mr. Blumberg offered to return the Calvanese file to Mr. Kerlinsky in return for payment of 16 2/3% of the 50% contingent fee (the 16 2/3% later was reduced to 15%). Mr. Kerlinsky consented in writing.

In June 1978, Faulkner settled with Calvanese for $5,500.

On June 23, 1978, after trial, a jury found for Babcock. Mr. Kerlinsky pursued an appeal and on November 21, 1980 the Appeals Court reversed the judgment for Babcock and

ordered a new trial. On July 27, 1981, Babcock and Calvanese through Mr. Kerlinsky, agreed to settle the case of $22,500 and on August 21, 1981, Mr. Kerlinsky gave Calvanese a proposed accounting of the disbursement of the Babcock settlement funds.

Mr. Kerlinsky claimed $11,250 which amounted to 50% of the settlement as his own fee. In addition, Mr. Kerlinsky withheld $3,375 as Mr. Blumberg's fee (a deduction which Mr. Kerlinsky later characterized as an "expense") and several other deductions for expenses relating to different cases that Mr. Kerlinsky was then handling for Calvanese. Initially, Calvanese accepted a check for $6,035.82. However, he later returned the check and objected both to Mr. Kerlinsky's taking a 50% rather than a 33 1/3% fee and to the deduction of funds to pay expenses in

unrelated cases. Although Mr. Kerlinsky testified that Calvanese had orally agreed to pay an additional non-contingent fee for services performed on the appeal, the hearing committee specifically declined to make a finding that the contingent fee agreement had been modified.

Mr. Calvanese filed a complaint with Board of Bar Overseers and Bar Counsel which, in October 1981, determined that this was simply a fee dispute which did not involve any violation of Canons of Ethics. Thereupon Mr. Kerlinsky opened a savings account and deposited $11,232 into the account, which included basically all the sums received with the exception of his claimed fee of $11,250.

In 1984, Calvanese's estate and Mr. Kerlinsky reached an agreement in which Mr. Kerlinsky paid the Calvanese estate $8,700 in

return for a release of all claims against Mr. Kerlinsky.

It was undisputed that the fair and reasonable value of Mr. Kerlinsky's services for the appeal alone was about $15,000. It was also undisputed by Calvanese and his attorney that there was never any "undisputed funds" or portion of the settlement, apart from a 1/3 fee, as Mr. Kerlinsky claimed additional monies for additional work of the appeal from the very first discussion with the client regarding his remittance.

In September 1983, after Calvanese died, a new complaint was filed with the Board of Bar Overseers by his estate this time claiming that Mr. Kerlinsky had failed to account for the $5,500 Faulkner settlement, along with a repetition of the earlier claims. The hearing committee found that

there was no impropriety whatsoever regarding the $5,500 Faulkner settlement.

The hearing committee of the Board of Bar Overseers on February 5, 1985, without any citation of authority or statement of its reasons concluded that as a matter of law "the 1965 fee agreement established the fee to which respondent is entitled". Mr. Kerlinsky had argued in view of Slepin v. Beck, 145 N.Y.S. 530 (1914); Vitale v. Lecour, 459 N.Y.S.2d 881 (1983); Hey v. Simon, 93 S.W.50 (1906); Union Bank and Trust of Helena v. Penwell, 42 P2d 457, 461, 462 (1935) that the contingent fee agreement terminated in 1978 after trial and before he undertook any appeal, quoting from Slepin v. Beck, "It would certainly be a surprise to the profession and perhaps a greater surprise to their clients, to be told that an

attorney, by virtue of his original retainer to prosecute or defend an action, had authority to take and prosecute an appeal from judgment rendered in the action. Of course, he has no such authority". This opinion held that services for an appeal is "a new and different employment".

Mr. Kerlinsky argued before the Board of Bar Overseers, the single justice and the full bench of the SJC that he should not be censured or punished by any ex post facto ruling without fair warning. The question of interpretation of the contingent fee contract was one of first impression in Massachusetts and there was authority in his favor in other jurisdictions. Bar Counsel conceded at the oral argument before the full bench of the Supreme Judicial Court that there was no Massachusetts precedent on the issue and that

Mr. Kerlinsky had acted in good faith. Mr. Kerlinsky argued in the Supreme Judicial Court that retroactive promulgations and imposition of new standards have been held to be violative of the due process clause of the United States Constitution citing Marks v. U.S., 430 U.S. 188, 97 S.Ct. 990 (1977), Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939). "There is no question but that the attorney discipline proceedings are subject to due process scrutiny." In re Ruffalo, 390 U.S. 554, 88 S.Ct. 1226, 1228 (1968).

I. The federal issue regarding ex post facto punishment was raised at the hearing before the single justice, and in the brief and argument on appeal to the full bench of the Supreme Judicial Court. The hearing before the single justice was solely an oral

argument held within thirteen (13) days of the filing of the proceeding in court. The ex post facto argument was not dealt with by the single justice who wrote an order but no opinion. The Supreme Judicial Court did not specifically pass on the argument but stated in its opinion "We will not engage in point-by-point refutation of this or other contentions." P.75.

Pages 46, 47 and 48 of petitioner's brief to the Supreme Judicial Court are as follows: "Even if respondent erred in his interpretation of applicable law, this was done in good faith without any deceit, malevolent intent, fraud or theft involved. Until there is a clear, advance statement that the charging of a fee for an appeal in these circumstances is unwarranted, no unethical conduct should be found and no

sanction should be imposed."

"Charging an additional fee for extra work on an appeal, where the fee agreement does not cover or require an appeal, should not be deemed an unethical act warranting any sanction in the present state of Massachusetts law. This is not a case where the attorney charged more than what his services were worth. In fact the total claimed was less than the fair and reasonable value of the services rendered. This is a dispute regarding the interpretation of a written agreement where there is substantial case law in support of respondent's position. Even if he made a mistake in law, this is not an action of contract and no sanction should be imposed for a good faith error of law, especially where bar counsel in October 1981 agreed with respondent that this was a fee

dispute only, and dismissed the complaint."

"If the Supreme Judicial Court rules that an attorney who entered an agreement using the Rule 14 form is not warranted in charging an extra fee for his services on appeal where his client did not prevail at a trial, then it is respectfully submitted this should be done by a written decision promulgated to the public and the bar and applied prospectively only. See Commonwealth v. Klein, 372 MA 823, 363 N.E.2d 1313, 1320 (1977). Retroactive promulgations and imposition of new standards have been held to be violative of the due process clause of the U.S. Constitution. Marks v. U.S., 430 U.S. 188, 97 S.Ct. 990 (1977); Lanzetta v. N.J., 306 U.S. 451, 59 S.Ct, 618 (1939). "There is no question but that attorney discipline proceedings are subject to due process scrutiny. In re

Ruffalo, 390 U.S. 544, 88 S.Ct 1222 (1968)." In re Bithoney, 486 F2d 319, 323 (1st Cir. 1973). In the circumstances of this case, the standard should not be applied retroactively. It cannot fairly be said that the respondent was on notice of his possible unethical misconduct. The law should not be applied retroactively against him. "On the evidence, no lawless motive or malicious spirit can be attributed to him." Commonwealth v. Klein, supra 1320. The hearing committee did not find any wrongful intent on his part."

Petitioner's petition for rehearing of November 20, 1989 included "It violates the right to due process of law to impose punishment on one where there is no clear notice that he may be committing a wrong....There is no question but that

attorney disciplinary proceedings are subject to due process scrutiny. In re Ruffalo, 390 U.S. 944 (1968)....Ex post facto imposition of punishment is violative of the U.S. Constitution.....For the appellant to be punished because of the Court's new ruling without prior notice is unfair, it is respectfully submitted and violative of the constitutional right to due process of law."

J. Arguments for Allowing Petition for Certiorari.

The state court has decided a federal question in a way that conflicts with applicable decisions of this Court. It has imposed ex post facto sanctions in disregard of the rule of law and due process rights under the Federal Constitution.

This case raises the question of whether the Supreme Judicial Court of the

Commonwealth of Massachusetts has disregarded the rule of law by imposing, in effect, ex post facto sanctions against an attorney in violation of his right to due process under the Fifth and Fourteenth Amendments of the Constitution of the United States. Bar disciplinary sanctions are "of a quasi criminal nature." In Re Ruffalo, 390 U.S. 454, 88 S.Ct. 1222 (1968). Without any Massachusetts precedent (and Bar counsel so conceded at oral argument), the said court ruled that an attorney's contingent fee agreement, in the form prescribed by said court, does not terminate after trial, and that this agreement prohibits an attorney from seeking additional compensation for his services for an appeal. Because petitioner sought extra pay for the extra work of an appeal he has been publicly censured and

ordered to pay fines.

Petitioner relied on a number of cases in support of his contention that the contingent fee agreement terminated following trial and did not apply to services rendered on appeal including Slepin v. Beck, 145 N.Y.S. 530 (1914) supra.

The Supreme Judicial Court disagreed with petitioner's interpretation of his contract and opined that the petitioner "clings" to "an unreasonable position" regarding said fee agreement thus warranting its order for money sanctions and public censure of the petitioner. P. 77. There was no finding of any bad faith or improper intent or dishonesty of any kind.

In U.S. v. Goodwin, 457 U.S. 368, 372 (1982) the Court held "To punish a person because he has done what the law plainly

allows him to do is a due process violation 'of the most basic sort'".

The clinging referred to was using the appeals procedure set forth by the Supreme Judicial Court regarding a complaint by a client. This clinging occurred after the Board of Bar Overseers and Bar Counsel in October 1981 initially agreed with petitioner's position, that this client's complaint was solely a fee dispute and did not involve a grievance or an ethical violation, and after the fee dispute was settled with the client signing a complete release in 1984. Sanctions were nonetheless imposed in 1989 on the petitioner for litigating his position.

The court decided without any reference to Massachusetts authority, as there was none, that "on the main issue, the agreement

is quite explicit:....the 33 1/3% cap on compensation in the agreement is to be construed as including payment for the rendition of all legal services, both trial and appellate, necessary to bring the claim to a final conclusion." P 73. This unprecedented interpretation of this contract was the basis for imposition of sanctions against a member of the bar.

In Marks v. United States, 430 U.S. 188, 191, 97 S.Ct. 990, 993, (1977) this Court stated "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties-is fundamental to our concept of constitutional liberty....As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment". It is respectfully submitted there was no "fair

warning" that litigating a position supported by precedent and an earlier decision of the Board of Bar Overseers and its Bar Counsel would constitute a sanctionable offense by an attorney.

There is a clear and present danger that the imposition of sanctions by the Supreme Judicial Court on attorneys "might inhibit the bar from the most vigorous advocacy of client's positions and thus restrict meaningful access to the court....Sensitivity to these considerations require that we indulge every presumption in favor of the attorney who presents or defends a position which is found to lack support. We must insure that there is breathing room for the fullest possible exercise of the adversary function." In Re Bithoney, 486 F2d 319, 322 (1st Cir. 1973).

The opinion of the SJC omits essential facts and is misleading. It is undisputed and of record that the fair value of petitioner's legal services for the appeal alone was about $15,0000; that he claimed additional monies for this work from the very first discussion with the client regarding his remittance; that there was no "undisputed portion of the recovery". The SJC implied a violation of a Canon of Ethics occurred because an "undisputed portion" of a client's funds was withheld. However, the violation occurs when money to which "the client is entitled to receive" is withheld. DR-9-102 B(4). Client would not have been entitled to receive any funds had the SJC construed the contingent fee agreement to terminate at the conclusion of the trial in accordance with Slepin v. Beck, supra, and the understanding

of attorneys "experienced in the area of law involved". Canon, 9-DR2-106B. Had the SJC so interpreted the fee agreement, no violation could be found.

In addition, the holding that an agreement to divide fees with another attorney without full disclosure to and consent of the client constituted a violation of DR 2-107(A)(1) was unprecedented as 2-107(A)(1) provides " lawyer shall not divide a fee.....unless: (1) the client consents to employment of the other lawyer after a full disclosure that a division of fees will be made". Here there was no division of fees as nothing was paid to any other lawyer. P. 71. Also client did consent to the employment of the other lawyer after a full disclosure that a division of fees will be made. The SJC opinion so

indicates (P.69) and there is no finding in the record to the contrary.

Substantiality of the Questions Presented

In this case the Supreme Judicial Court of the Commonwealth of Massachusetts has disregarded the rule of law and has imposed sanctions against an attorney by ex post facto law. It was aware that there was no Massachusetts precedent involved in interpretation of the contract in issue and that there was substantial precedent in favor of the petitioner's position. Yet it ruled, based on its new interpretation of the contract, that there was a violation of provisions of a code of ethics of the Commonwealth. However, as there was never any "fair warning" of the new interpretation, the imposition of sanctions was an unjustifiable punishment of an attorney. The

effect thereof is to indicate to the members of the Bar that the Supreme Judicial Court has and will disregard the rule of law. This will have a chilling effect on access to the courts of Massachusetts and the presentation of any argument therein that is not supported by precedent in Massachusetts thus chilling the common law process of development of the law.

## CONCLUSION

The Court should review this case because undermining of the rule of law by the Supreme Judicial Court of the Commonwealth of Massachusetts requires corrective action.

There can be no respect for law in the Commonwealth of Massachusetts where the Supreme Judicial Court imposes ex post facto punishment in violation of the United States Constitution and the right to due process of

law. Lawyers in the Commonwealth will be intimidated in their presentation of any argument unless it is supported by Massachusetts precedent resulting in a stultifying of the law of the Commonwealth and injustice in many cases.

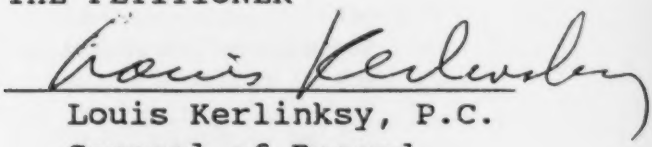
"A bar composed of lawyers of good moral character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated-free to think, speak, and act as members of an independent bar." Konigsperg v. State Bar, 353 U.S. 252, 273, 77 S.Ct. 722, 733 (1957).

The allowance of this petition is needed for the administration of justice in Massachusetts.

The legal system is undermined when a disregard of its fundamental principle, the rule of law, by the Supreme Judicial Court of a state is uncorrected.

Respectfully submitted.

THE PETITIONER



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BRIEF.001

A.

# IN THE MATTER OF LOUIS KERLINSKY.

Suffolk. October 3, 1989. - November 13, 1989.

Present: LIACOS, C.J., WILKINS, NOLAN, & GREANEY, JJ.

*Attorney at Law*, Disciplinary proceeding, Canons of ethics, Compensation, Contingent fee agreement, Division of fees.

The Board of Bar Overseers was warranted in finding that an attorney had violated S.J.C. Rule 3:07, Canon 2, DR 2-106 (A) and (C), by taking a fee from a client in excess of the amount provided in a written contingent fee agreement. [72-74]

An agreement by two attorneys to divide a fee without full disclosure to and consent by the client constituted a violation of S.J.C. Rule 3:07, Canon 2, DR 2-107 (A) (1). [74]

An attorney's retaining possession of funds demanded by a client and undisputedly due him violated S.J.C. Rule 3:07, Canon 1, DR 1-102 (A) (6), prohibiting an attorney from engaging in conduct which reflects adversely on his fitness to practice law [74], and Canon 9, DR 9-102 (B) (4), requiring an attorney to deliver promptly to a client property which the client is entitled to receive. [75]

The record of a disciplinary proceeding before the Board of Bar Overseers did not support the respondent attorney's contention that the matter should have been dismissed due to laches. [75-76]

A single justice of this court, after considering an information filed by the Board of Bar Overseers, including the record before the board, correctly ordered that an attorney pay certain funds to the estate of a former client and that he be publicly censured. [76-77]

INFORMATION filed in the Supreme Judicial Court for the county of Suffolk on January 11, 1989.

The case was heard by *Lynch*, J.

*Louis Kerlinsky*, pro se.

*Nancy E. Kaufman*, Assistant Bar Counsel (*Daniel J. Klubock*, Bar Counsel, with her).

GREANEY, J. A single justice of this court has ordered that Attorney Louis Kerlinsky pay certain funds to the estate of a

former client and that Mr. Kerlinsky be publicly censured. The single justice's order entered after consideration of an information filed by the Board of Bar Overseers (board), including the extensive record compiled before the board. Mr. Kerlinsky has appealed from the order. We conclude that Mr. Kerlinsky has acted improperly and that the discipline ordered by the single justice was appropriate.

The proceedings before the board pertained to allegations that Mr. Kerlinsky violated several bar disciplinary rules in the disposition of settlements negotiated by him on behalf of Joseph E. Calvanese in a personal injury action against Faulkner Hardware Company and W.W. Babcock Company, Inc. The following facts were found by a hearing committee of the board.

Mr. Kerlinsky has practiced law in the Commonwealth since 1952, and since 1972, he has practiced primarily in the area of personal injury litigation. On June 30, 1965, Joseph Calvanese fell from a ladder while at work. Calvanese retained Mr. Kerlinsky to represent him in a workers' compensation action and to pursue remedies for damages from his injuries. On September 16, 1965, Calvanese and Mr. Kerlinsky entered into a written contingent fee agreement using the form set out in S.J.C. General Rule 14, 348 Mass. 806, (1965).[1] The agreement described "[t]he claim, controversy, and other matters with reference to which the services are to be performed" simply as the "accident [of] June 30, 1965." No exceptions were listed under the clause stating that "[t]he client is not liable to pay compensation otherwise than from amounts collected for him by the attorney except as follows." The agreement also called for "[r]easonable compensation . . . to be paid by the client to the attorney, but such compensation (including that of any associated counsel) is not to exceed the following maximum percentages of the gross amount collected:

[1]The present rule on contingent fee agreements is contained in S.J.C. Rule 3:05, as appearing in 382 Mass. 762 (1981). The form suggested in General Rule 14 and the one suggested in rule 3:05 are basically the same.

"25% if settled out of Court

"33 ⅓% if Court action

"[a]nd 20% re: Workmen's Comp." Mr. Kerlinsky and Calvanese did not enter into any subsequent written agreement amending this contingent fee arrangement.

In 1967, Calvanese agreed to a settlement of his workers' compensation claim, and Mr. Kerlinsky received 20% of the settlement as his fee. That same year, Mr. Kerlinsky brought suit against Faulkner Hardware Company, the Massachusetts business which had sold the ladder to Calvanese's employer, and referred the case against Babcock Company (the New York corporation which had manufactured the ladder) to a New York law firm.

In 1975, Mr. Kerlinsky changed New York counsel. In June, 1975, Calvanese signed a document purporting to hire Attorney Sydney Blumberg of Syracuse, New York, to institute legal proceedings against Babcock. Calvanese agreed to pay Mr. Blumberg 50% of any settlement, verdict, or recovery obtained in the Babcock action. Calvanese was the only person who signed the agreement. Mr. Kerlinsky wrote above Calvanese's signature that "⅓ of said fee is to be paid Atty. Louis Kerlinsky."

After reviewing the case file, Mr. Blumberg advised Mr. Kerlinsky to abandon suit in New York and to sue Babcock in Massachusetts. Sometime in 1976, Mr. Kerlinsky's motion was allowed to add Babcock as a party defendant in the pending suit against Faulkner. In April, Mr. Blumberg offered to return the Calvanese file to Mr. Kerlinsky in exchange for payment of 16 ⅔% of the 50% contingent fee (the 16 ⅔% later was reduced to 15%). Mr. Kerlinsky consented in writing. Calvanese did not sign that agreement. Mr. Blumberg made no further substantive contributions to the case.

In June, 1978, Faulkner settled with Calvanese for $5,500. Mr. Kerlinsky received one-third of the settlement as his

fee.[2] On June 23, 1978, after trial, a jury found for Babcock. Mr. Kerlinsky pursued an appeal and on November 21, 1980, the Appeals Court reversed the judgment for Babcock and ordered a new trial. See *Calvanese* v. *W.W. Babcock Co.*, 10 Mass. App. Ct. 726 (1980). On July 27, 1981, Babcock and Calvanese, through Mr. Kerlinsky, agreed to settle the case for $22,500, and on August 21, 1981, Mr. Kerlinsky gave Calvanese an accounting of the disbursement of the Babcock settlement funds. Mr. Kerlinsky claimed $11,250, which amounted to 50% of the settlement, as his own fee. In addition, Mr. Kerlinsky withheld $3,375, as Mr. Blumberg's fee (a deduction which Mr. Kerlinsky characterized as an "expense") and several other deductions for expenses relating to different cases that Mr. Kerlinsky was then handling for Calvanese.

Initially, Calvanese accepted a check for $6,035.82. However, he later returned the check and objected both to Mr. Kerlinsky's taking a 50% fee rather than the 33 ⅓% fee that had been spelled out in the contingent fee agreement and to the deduction of funds to pay expenses in unrelated cases. Although Mr. Kerlinsky testified that Calvanese had agreed orally to pay an additional noncontingent fee for services performed on the appeal, the hearing committee specifically declined to make a finding that the contingent fee agreement had been modified.

In October, 1981, Calvanese hired another attorney to obtain both an accounting from Mr. Kerlinsky and the money Calvanese believed to be his share of the Faulkner and Babcock settlements.

On October 30, 1981, Mr. Kerlinsky opened a savings account entitled, "Louis Kerlinsky P.C. Trustee for Joseph Calvanese," and deposited $11,200.32 into the account. This sum included $6,035.82, which was Calvanese's allocated share of the Babcock settlement, $1,680 for a physician's bill

[2]Although Calvanese initially received $3,666.66, as his share of the Faulkner settlement, the hearing committee found that, by September 15, 1978, he had voluntarily turned over that entire amount to Mr. Kerlinsky to pay for expenses in the Babcock trial and three unrelated cases.

and $105 for a medical bill (expenses in the unrelated cases), $3,375 for the 15% fee purportedly due Mr. Blumberg, and accrued interest. Notwithstanding the fact that Calvanese had disputed Mr. Kerlinsky's right to a fee greater than 33 ⅓% of the recovery, Mr. Kerlinsky retained 50% as his fee.

Despite repeated demands from Calvanese's attorney for an accounting of the $28,000 received in the Faulkner and Babcock settlements, and for payment of the $6,035.82 that Mr. Kerlinsky had allocated as Calvanese's share of the Babcock settlement, Mr. Kerlinsky refused to turn over any of the funds until Calvanese agreed to pay disputed fees in the unrelated cases.

In March, 1983, Calvanese died. His wife, Angelina, was appointed administratrix of her husband's estate. She retained a new attorney to represent her. In 1984, this attorney and Mr. Kerlinsky reached an agreement in which Mr. Kerlinsky paid the Calvanese estate $8,700 in return for a release of all claims against Mr. Kerlinsky. Mr. Kerlinsky took the $8,700 from the funds being held in trust for Calvanese.[3]

Mr. Kerlinsky has never paid Mr. Blumberg or any other bills at issue here. Mr. Blumberg died in January, 1986. His estate has waived any claim to funds from the Babcock settlement. Mr. Kerlinsky acknowledges that Calvanese never agreed to pay Mr. Blumberg a fee over and above the 50% contingent fee called for in the Blumberg fee agreement signed in 1975.

At the time of the hearing, the savings account in trust for Calvanese had over $6,000 in it.

Based on these facts (found in much greater detail by the hearing committee and reviewed by a panel of the board), the board concluded that Mr. Kerlinsky had violated several

[3]The administratrix was advised that, notwithstanding the settlement, the board would continue its inquiry into Mr. Kerlinsky's conduct and that the board might order him to turn over additional funds to the estate. A settlement or compromise would neither terminate the investigation of Mr. Kerlinsky nor foreclose any later order by the single justice of this court that directed Mr. Kerlinsky to repay funds. See S.J.C. Rule 4:01, § 10, 365 Mass. 704 (1974).

disciplinary rules contained in S.J.C. Rule 3:07, as appearing in 382 Mass. 768 (1981): Canon 2, DR 2-106 (C) (contingent fee agreements as presently governed by S.J.C. Rule 3:05); Canon 2, DR 2-106 (A) (collection of an illegal or clearly excessive fee); Canon 2, DR 2-107 (A)(1) (full disclosure of a division of fees); Canon 1, DR 1-102 (A)(5) (conduct prejudicial to the administration of justice); Canon 1, DR 1-102 (A)(6) (conduct adversely reflecting on fitness to practice law); Canon 9, DR 9-102 (B)(4) (prompt delivery of funds to a client).[4]

We agree with the single justice's determination that, on the facts found (which have adequate support in the evidence), the violations have been substantially proved. Mr. Kerlinsky has taken a 50% fee in the face of a written contingent fee agreement which limits his fee to 33 ⅓% of the recovery in the claims pertaining to Calvanese's fall from the ladder. The hearing committee concluded that there was no other valid agreement between Calvanese and Mr. Kerlinsky increasing that maximum fee. Although Mr. Kerlinsky insists that there had been an agreement of modification, the hearing committee acted within the authority conferred on fact finders to disregard his assertion and to conclude that the contingent fee agreement represented the entire understanding of the parties. Further, once Mr. Blumberg ceased to have an interest in the case, it became a Massachusetts matter governed by the contingent fee agreement of September 16, 1965.

The contingent fee agreement cannot be fairly read to support Mr. Kerlinsky's interpretations of any of the essential points. The fact that the agreement contains a blank space where "[t]he contingency upon which compensation is to be paid" is to be identified goes against Mr. Kerlinsky, who drafted the agreement and who thus had the obligation of seeing that all its parts were completed with clarity. See

[4]The hearing committee found that Mr. Kerlinsky had not violated DR 9-102 (B)(4). However, on Mr. Kerlinsky's appeal, the panel exercised its authority under S.J.C. Rule 4:01 § 8 (3), as appearing in 382 Mass. 820 (1981), and reversed this conclusion.

S.J.C. Rule 3:05 (5), as appearing in 382 Mass. 762, 763 (1981).[8] On the main issue, the agreement is quite explicit: - The fee to be paid by Calvanese to Mr. Kerlinsky for handling the case is "reasonable compensation," but "such compensation (including that of any associated counsel) is not to exceed the maximum percentage of . . . 33 ⅓%, if [there is] Court action." In the absence of a valid supplementary agreement for extra compensation in the event that an appeal had to be taken or defended, the 33 ⅓% cap on compensation in the agreement is to be construed as including payment for the rendition of all legal services, both trial and appellate, necessary to bring the claim to a final conclusion. See *Matter of Laughlin*, 265 F.2d 377, 378 (D.C. Cir. 1959), and cases cited. See also *Pocius* v. *Halvorsen*, 30 Ill. 2d 73, 80 (1964); *Knight* v. *DeMarea*, 670 S.W.2d 59, 62-63 (Mo. Ct. App. 1984); Annot., Construction of Contingent Fee Contract as Regards Compensation for Services After Judgment or on Appeal, 13 A.L.R.3d 673, 677-680 (1985). "The wisdom of the rule [including appellate work in an agreement like the one in issue] is apparent — if the attorney is to be entitled to a contingent fee then it is necessary either to defend a favorable judgment on appeal or to attempt to overturn an unfavorable judgment. In either effort the attorney is doing only that which would be required to achieve a favorable outcome which would assure the right to collect a contingent fee." *Knight* v. *DeMarea*, *supra* at 63. There is, therefore, a violation of DR 2-106 (A) and (C) in that Mr. Kerlinsky has charged an excessive fee by taking

[8]The fact that Mr. Kerlinsky used the form of contingent fee agreement suggested by Supreme Judicial Court rule as an exemplar will not, as he argues, excuse him from the principle that any obscurities in the agreement will be taken against the attorney who drafted it. The statement in rule 3:05 that the use of the suggested form will be "sufficient" is not exculpatory as to Mr. Kerlinsky's duty. It was Mr. Kerlinsky's obligation to indicate the circumstances which would oblige Calvanese to pay compensation in excess of the amount specified as the maximum by the agreement. The problem rests in the language used by Mr. Kerlinsky in this fee agreement, not in any of the language suggested by the rule for a contingent fee agreement.

50% of the Babcock recovery when there was no proper written contingent fee agreement to justify that amount.

The board was warranted in finding that the other violations of the disciplinary rules have been proved.

a. Mr. Kerlinsky kept not only 50% of the Babcock recovery as his fee, but he also retained 15% of the recovery as a fee claimed to be owed to Mr. Blumberg. Thus, in the end, 65% of the total recovery was slated to go to lawyers. Mr. Kerlinsky and Mr. Blumberg negotiated between themselves as to a division of these fees. Although Calvanese had at one time agreed to pay a contingent fee to Mr. Blumberg, he apparently did so on the basis that the suit would be brought in New York. Calvanese did not consent to the division worked out by the two lawyers once Mr. Blumberg returned the case to Mr. Kerlinsky for litigation in Massachusetts.

Mr. Kerlinsky argues that Mr. Blumberg's 15% fee was not a legal fee but simply an "expense." The record is fairly clear, however, that Mr. Blumberg's proposed fee was retained for his participation in the case, which consisted of examining the file and referring the case back to Mr. Kerlinsky. Since Mr. Blumberg was not Mr. Kerlinsky's partner or associate, the agreement to divide fees after the file had been returned from New York to Massachusetts, without full disclosure to and consent by Calvanese, constituted a violation of DR 2-107 (A)(1), which pertains to the division of fees among lawyers.

b. Despite demands by the attorney for Calvanese, Mr. Kerlinsky refused to turn over funds which he retained to pay medical bills and Mr. Blumberg. In addition, Mr. Kerlinsky refused to turn over even the undisputed portion of the Babcock recovery which was due to Calvanese. In so doing, Mr. Kerlinsky engaged in conduct which reflected adversely on his fitness to practice law as provided for by DR 1-102 (A)(6).[6]

[6]It is not entirely clear how this conduct was prejudicial to the administration of justice in violation of DR 1-102 (A)(5). The allegation was that Mr. Kerlinsky disobeyed the order of the court in the Faulkner case which required him to give $3,666.66 to Calvanese. The hearing committee found

c. It was also determined that Mr. Kerlinsky's conduct in refusing to turn over the undisputed portion of the recovery, despite repeated demands by Calvanese's attorney, was a violation of DR 9-102 (B)(4), which requires a lawyer to deliver promptly to a client property which the client is entitled to receive. On the facts found by the hearing committee, this was a proper conclusion.

What has been said disposes of most of Mr. Kerlinsky's arguments. We will not engage in a point-by-point refutation of his other contentions. Suffice it to say that many of Mr. Kerlinsky's arguments depend on an interpretation of the evidence and the controlling facts that was not accepted by the board.

One contention, however, does deserve comment. Mr. Kerlinsky maintains that this matter should have been dismissed due to laches. The hearing committee found that "the [attorney] has been prejudiced in his defense" by the delay in the proceedings and the deaths of Calvanese and Mr. Blumberg. However, the record contains considerable evidence which corroborates the allegations made by Calvanese prior to his death. While cross-examination of Calvanese and examination of Mr. Blumberg might have been helpful to Mr. Kerlinsky, the inability to interrogate these witnesses was not substantially prejudicial. Not only were Calvanese's allegations corroborated, but Mr. Kerlinsky's own correspondence with Mr. Blumberg verified most of the hearing committee's findings regarding the fees retained by Mr. Kerlinsky. Further, the hearing committee, despite its finding of prejudice, concluded that several violations of the disciplinary rules had not been clearly proved. This indicates that the committee generally resolved in Mr. Kerlinsky's favor questions which might have depended solely on Calvanese's credibility, and that the

as fact, however, that Calvanese voluntarily delivered this $3,666.66 to Mr. Kerlinsky to pay expenses in other actions. The finding that DR 1-102 (A)(5) has been violated may have been an oversight. We pass the issue because more serious charges have been proved, and the absence of a clear-cut violation on this charge will not alter the discipline we conclude ought to be imposed.

committee did not deem the delay sufficient to warrant dismissal of the charges. Finally, Mr. Kerlinsky is not in a good position to rely on an equitable principle such as laches since he has retained funds of the client's which are clearly not his.

There is finally the matter of the discipline to be imposed. The single justice entered the order set forth below.[7] The full court, when reviewing a disciplinary decision of a single justice, inquires whether the order is "markedly disparate" from those ordinarily entered by single justices in similar cases. *Matter of Clooney*, 403 Mass. 654, 658 (1988). Bar counsel has brought to our attention several cases which indicate that the order of the single justice in this case is consistent with orders of other single justices involving generally similar matters. We note that the ABA Standards For Imposing Lawyer Sanctions § 7.3 (1986), recommends a public "reprimand" in cases involving excessive or improper fees. It also appears that mitigating factors were taken into account in calculating the discipline to be imposed.[8]

The fact remains that the client's tort action has remained unresolved as to final recovery more than twenty-four years after Mr. Kerlinsky undertook legal representation. This unfortunate situation has occurred because Mr. Kerlinsky

[7]"(1) Louis Kerlinsky shall within ten (10) days pay over to the legal representatives of the Calvanese Estate the funds he was holding as Trustee for Joseph Calvanese at the Bank of New England-West, plus $3,750.00, with interest from August 21, 1981, said interest to be computed pursuant to G. L. c. 221, §51, the latter sum representing the fee charged by the respondent in excess of 33 ⅓% of the Babcock recovery. (2) Upon verification that said money has been paid, Judgment shall enter publicly censuring Louis Kerlinsky."

[8]These factors include the following: Mr. Kerlinsky did a commendable job in handling the legal aspects of the Babcock case. He has not appropriated the funds in question except the disputed portion of his fee. He has kept the funds in a segregated account. Further, bar counsel initially treated the matter as a fee dispute, closing the file in 1981 and reopening it when allegations were made which raised more serious questions about Mr. Kerlinsky's conduct. The delay in bringing the matter to a hearing resulted in Mr. Kerlinsky's inability to obtain testimony from Mr. Blumberg and to examine Calvanese. While, as has been indicated, the delay does not warrant dismissal, it is a mitigating circumstance to be considered.

clings to the unreasonable position that he should have 50% of the recovery, notwithstanding the contrary provisions of the applicable contingent fee agreement drawn by him. This conduct deserves public rebuke and an order for repayment accompanied by an assessment of penalty interest as provided for by G. L. c. 221, § 51 (1988 ed.).

*Order of the single justice affirmed.*

B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO.: 5056

IN THE MATTER OF:
LOUIS KERLINSKY

MEMORANDUM AND ORDER

This is a motion for clarification in this bar discipline case which was referred to the single justice for determination. The underlying decision is contained at 406 Mass. 67, in which the Court affirmed the order of the single justice. The order which was affirmed provides as follows:

"(1) Louis Kerlinsky shall within ten (10) days pay over to legal representatives of the Calvanese Estate the funds he was holding as Trustee for Joseph Calvanese at the Bank of New England-West, plus $3,750.00, with interest from August 21, 1981, said interest to

be computed pursuant to G.L. c. 221, sec. 51, the latter sum representing the fee charged by the respondent in excess of 33 1/3% of the Babcock recover

(2) Upon verification that said money has been paid, Judgment shall enter publicly censuring Louis Kerlinsky."

Bar counsel and Mr. Kerlinsky disagree over the interpretation of this order. The present request for clarification requests advice in these areas as follows:

(a) Whether interest owed together with the penalty as set forth in G.L. c. 221, sec. 51 applies to both the excessive fee of $3,750.00 and the $11,200.00 wrongfully place in trust by Mr. Kerlinsky;

(b) whether G.L. c. 107, sec. 3 or G.L. c. 231, sec.6C, provides the legal rate of interest to which the penalty provisions of G.L. c. 221, sec. 51 apply; and

(c) whether interest and the penalty on interest continues to accrue after the date of order of the single justice, and, if so, to what date.

The respective positions of the parties as to these three issues are set forth in respective papers filed by them. After consideration of the materials in the record and the arguments of bar counsel and Mr. Kerlinsky I conclude that a more literal reading of the single justice's order indicates that the penalty set forth in G.L. c. 221, sec. 51, applies only to the $3,750 which represents the excessive fee charged by

Mr. Kerlinsky. I further conclude that G.L. c. 231, sec. 6C, not G.L. c. 107, sec. 3, is the underlying statute to which the penalty provisions of G.L. c. 221, sec. 51 are to apply, and that the applicable period for determining the amount due from Mr. Kerlinsky runs to December 5, 1989, the date on which partial payment was made by him.

An order is to enter on the motion for clarification which embodies these determinations after which the case is to proceed in accordance with the order of the single justice which was affirmed by the Full Court in 406 Mass. 67.

August 16, 1990 /s/ John M. Greaney

John M. Greaney,
Associate Justice

COMMONWEALTH OF MASSACHUSETTS C

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

At Boston, September 4, 1990

In the case No. SJC-5056

IN RE: LOUIS KERLINSKY

O R D E R

Pursuant to G.L. c. 221, sec. 51, the respondent, Louis Kerlinsky, is to pay the sum of $3,750, with interest from August 21, 1981 to December 5, 1989, computed at the rate set forth in G.L. c. 231, sec. 6C.

By the Court,

Jean M. Kennett, Clerk

Entered: September 4, 1990

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed this day of November , 1990 to Nancy Kaufman, Attorney for the Board of Bar Overseers, 75 Federal Street, Boston, MA 02110 and Clerk of the Supreme Judicial Court, 1404 Courthouse, Boston, MA 02108.

Louis Kerlinsky